

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

JOSH FLAHERTY,)	
)	
Employee/Grievant,)	
)	DOCKET No. 15-07-631
v.)	
)	
DEPARTMENT OF HEALTH AND)	
SOCIAL SERVICES,)	DECISION AND ORDER
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) on October 1, 2015, at 9:00 a.m. at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Paul R. Houck, and Jacqueline D. Jenkins, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah Murray-Sheppard
Board Administrator

Josh Flaherty
Employee/Grievant *pro se*

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Board did not admit any exhibits into evidence or take any witness testimony. The Board heard legal argument from the parties on the motion by the Department of Health and Social Services (DHSS) to dismiss the appeal of the employee/grievant, Josh Flaherty (“Flaherty”), for lack of jurisdiction. Flaherty filed a written response to the motion to dismiss.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Flaherty was employed by the DHSS, Division of Child Support Enforcement (“DCSE”) as a Child Support Specialist I. By letter dated January 8, 2015, the DCSE Director recommended that Flaherty be dismissed for a misappropriation of funds. Flaherty was advised that he was entitled to a pre-decision meeting, which was convened on February 3, 2015.

On February 11, 2015, Flaherty was advised by letter from the DHSS Secretary that she concurred in the recommendation to terminate him. His termination was effective immediately.

On March 3, 2015, Flaherty filed a Step 1 grievance contesting his termination. The Secretary’s designee initially heard the grievance at a Step 2 hearing on March 23, 2015. The Step 2 decision was issued on March 24, 2015, upholding the termination as appropriate.

Flaherty appealed the Step 2 decision to Step 3. An Office of Management and Budget (“OMB”) Human Resource Management Hearing Officer convened the hearing on May 20, 2015, and issued her decision on June 8, 2015. The Hearing Officer concluded there was just cause to support the dismissal. The decision was sent to Flaherty by email on June 8, 2015.

Flaherty then filed an appeal to the Merit Employee Relations Board (MERB) which

was received in the Board's office on July 6, 2015.¹

CONCLUSIONS OF LAW

Merit Rule 18.9 provides:

If the grievance has not been settled, the grievant may present, within 20 calendar days of receipt of the Step 3 decision . . . a written appeal to the Merit Employee Relations Board

Merit Rule 18.4 states (in relevant part), "...Failure of the grievant to comply with time limits shall void the grievance."

Under the Merit Rules, a grievant's obligation to file a timely appeal to the Board "is jurisdictional." *Cunningham v. DHSS*, Civ.A. No. 95A-10-003, 1996 WL 190757, at p.2 (Del. Super., Mar. 27, 1996) (Ridgely, Pres. J.), *aff'd*, 679 A.2d 469 (Del. 1996). Where the deadline has "passed, the Board had no jurisdiction to hear Appellant's grievance."

1996 WL 190757, at p.2. "[A]ppellant's pro se status does not excuse a failure to timely comply with the jurisdictional requirements of [the Merit Rules]." *Id.* (quoting *Gibson v. State*, No. 354, 1994, (Del. 1994)).

The Step 3 decision was issued by the HRM Hearing Officer on June 8, 2015, and was sent to Flaherty by email on that date. Flaherty does not contest that he received the Step 3 decision on that date. Flaherty's appeal to the Board was postmarked July 2, 2015 and was received in the Board's offices on July 6, 2015.

The Board concludes as a matter of law that Flaherty did not file a timely appeal to the Board under Merit Rule 18.9. Merit Rule 18.9 requires a grievant to file an appeal to the Board "within 20 calendar days of receipt of the Step 3 decision." Flaherty mailed his appeal of the Step

¹ The envelope in which the appeal to MERB was received has a postal seal indicating it was processed by the post office on July 2, 2015.

3 decision to MERB twenty-four (24) days after he received that decision, and it was not delivered to the MERB office until July 6, 2015, twenty- eight (28) days after receipt of the Step 3 decision.

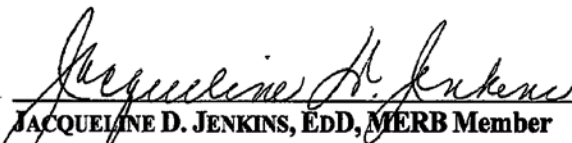
The Board concludes as a matter of law that it does not have jurisdiction over Flaherty's appeal because it was not timely filed within twenty days of his receipt of the Step 3 decision. Merit Rule 18.9. As a result, his appeal is void. Merit Rule 18.4.

DECISION AND ORDER

It is this **15th** day of October, 2015, by a unanimous vote of 3-0, the Decision and Order of the Board to grant the agency's motion to dismiss and to dismiss Flaherty's appeal for lack of jurisdiction.


MARTHA K. AUSTIN, MERB Chairwoman


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **October 15,** 2015

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
HRM/OMB
MERB Website